



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[EPA-R08-OAR-2011-0015; FRL- 9646-8]

**Clean Air Act Full Approval of
Title V Operating Permits Program; Southern Ute Indian Tribe**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating full approval of the Title V Operating Permits Program submitted by the Southern Ute Indian Tribe (Tribe). The Tribe's Title V Operating Permit Program (Title V Program) was submitted for the purpose of administering a tribal program for issuing operating permits to all major stationary sources, and certain other sources on the Southern Ute Indian Reservation (Reservation).

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], and is applicable beginning March 2, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2011-0015.

All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the

hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Alexis North, Air Program, Mailcode 8ENF-AT, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-7005, or north.alexis@epa.gov.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The word Act or initials CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The word Commission means the joint Southern Ute Indian Tribe/State of Colorado Environmental Commission.

(iii) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.

(iv) the word Title V Program means the Tribe's *Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009, the subsequent *Supplement to Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated September 28, 2010 and the *Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012.

(v) The word Tribe means the Southern Ute Indian Tribe, unless the context indicates otherwise.

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I. Background

Under Title V of the Clean Air Act (the Act or CAA) as amended (1990), EPA has promulgated rules that define the minimum elements of a full approval of a Title V operating permits program for state and tribal permitting authorities. The corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of state and tribal title V operating permits programs can be found at 57 FR 32250 (July 21, 1992) and 63 FR 1322 (January 10, 2000) and are codified at 40 CFR Part 70.

In addition, as part of the 1990 Amendments to the CAA, Congress enacted Section

301(d) authorizing EPA to “treat Indian tribes as states” under the Act so that tribes may develop and implement CAA programs in a similar manner as states within tribal reservations or in other areas subject to tribal jurisdiction. Section 301(d)(2) of the Act authorizes EPA to promulgate regulations specifying those provisions of the CAA “for which it is appropriate to treat Indian tribes as States.” 42 U.S.C. § 7601(d)(2).

On February 12, 1998, EPA issued a final rule specifying those provisions of the CAA for which it is appropriate to treat eligible Indian tribes in a similar manner as states, known as the Tribal Authority Rule (TAR). 63 FR 7254, codified at 40 CFR Part 49. As a general matter, the regulations authorize eligible Indian tribes to have the same rights and responsibilities as States under the CAA; however, EPA also determined in the TAR that it is not appropriate to treat Indian tribes in a similar manner as states for purposes of specific CAA program submittal and implementation deadlines. This is because, among other reasons (discussed at 59 FR at 43,964-65), although the CAA contains many provisions mandating the submittal of state plans, programs, or other requirements by certain dates, the Act does not similarly require Indian tribes to develop and seek approval of CAA programs.

Thus, Indian tribes are generally not subject to CAA provisions that specify a deadline by which something must be accomplished, e.g., provisions mandating the submission of state title V operating permits programs under sections 502(d)(1), 502(d)(2)(B), and 502(d)(3) of the Act. 40 CFR § 49.4.

A tribe that meets the eligibility criteria for treatment in a similar manner as a state (TAS) may, however, choose to implement a CAA program. A tribe may also submit reasonably severable portions of a CAA program, if it can demonstrate that its proposed air program is not integrally related to program elements not included in the plan submittal and is consistent with applicable statutory and regulatory requirements. 40 CFR § 49.7(c); see also CAA § 110(o). This

modular approach is intended to give Indian tribes the flexibility to address their most pressing air quality issues and acknowledges that Indian tribes often have limited resources with which to address their environmental concerns. Consistent with the exceptions listed in 40 CFR § 49.4, once submitted, an Indian tribe's proposed air program will be evaluated in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar state submittal. 40 CFR § 49.9(h).

EPA expects Indian tribes to fully implement and enforce their approved CAA programs and, as with states, EPA retains its authority to impose sanctions for failure to implement an approved air program. *See* 59 FR 43,956 at 43,965 (Aug. 25, 1994).

The CAA allows Indian tribes to develop and submit title V operating permit programs to EPA at their own discretion. The EPA's title V operating permit program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for interim approval, full approval or disapproval. The Tribe has requested operating permit program approval and this action is in response to that request.

II. Response to Comments

EPA did not receive any comments on our March 9, 2011 Federal Register notice proposing interim approval of the Tribe's Title V Program.

III. Evaluation of the Tribe's Authorities

The EPA completed a review of the Tribe's authority to regulate air pollution sources located within the exterior boundaries of the Reservation. Under section 301(d) of the CAA and the TAR, EPA may treat a tribe in a similar manner as a state for purposes of administering certain CAA programs or grants if the tribe demonstrates that: (1) it is a federally-recognized tribe; (2) it has a governing body carrying out substantial governmental duties and powers; (3) the functions to be exercised by the tribe pertain to the management and protection of air

resources within the exterior boundaries of the reservation (or in other areas under the tribe's jurisdiction); and (4) it can reasonably be expected to be capable, in EPA's judgment, of carrying out the functions for which it seeks approval, consistent with the CAA and applicable regulations. 40 CFR § 49.6. The sections below outline the details of EPA's review of the Tribe's authorities.

A. Current Tribal Authority

In July 1998 the Southern Ute Indian Tribe applied for TAS seeking approval to administer a CAA title V air quality operating permit program throughout the Reservation. The State of Colorado challenged the Tribe's CAA TAS application, asserting that the Act of May 21, 1984, Public Law 98-290, 25 U.S.C. 668, which defined the boundaries of the Reservation, established the State's jurisdiction to regulate non-Indian-owned air pollution sources located on fee lands within the Reservation. The Tribe and the State, while continuing to disagree over who has jurisdiction over these sources, formed the Southern Ute Indian Tribe/State of Colorado Environmental Commission (Commission), and executed an intergovernmental agreement (IGA) on December 13, 1999, to establish a single air quality program applicable to all lands within the exterior boundaries of the Reservation.

In general, the IGA allows for the Tribe to implement and administer CAA programs, on a Reservation-wide basis, through the joint Commission. It also provides that the State will support the Tribe's CAA TAS application as long as it is consistent with the IGA. Congress then passed the Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004, Pub. L. No. 108-336 on October 18, 2004, which codifies the basic framework of the IGA, and authorizes EPA to grant TAS authority to the Tribe for air programs submitted under CAA section 301(d). The Tribe has previously received TAS approval on April 26, 2000, for the purposes of grant funding under CAA Section 105.

On January 20, 2009, the Tribe submitted its CAA TAS application together with the Tribe's initial Title V Program. On July 14, 2009, EPA found the Tribe's CAA program TAS application to be administratively complete. This means the Tribe's CAA program TAS application contains the basic information needed for EPA to make a TAS eligibility determination.

On March 2, 2012, EPA issued its determination finding that the Tribe is eligible for TAS for the purposes of approval of the title V program.

B. Reasonably Severable Title V Program Elements

As previously discussed in Section I above, the TAR allows for Indian tribes to seek approval of partial elements of CAA programs as long as those portions are determined to be reasonably severable elements, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements. 40 CFR § 49.7(c). Each submittal is evaluated for adequacy by EPA on a case-by-case basis.

In the March 9, 2011 proposed interim approval, we stated that the underlying federal regulations at CAA sections 111 (Standards of Performance for New Stationary Sources), 112 (National Emissions Standards for Hazardous Air Pollutants) and the Acid Rain Program at title IV of the CAA were reasonably severable elements of a title V program. At that time, the Region's view was that the authority to implement and enforce these regulations independent of title V, as contrasted with the authority to include the requirements that apply to a particular source in that source's title V permit and to enforce those requirements, is a necessary part of an approvable title V program.

After careful consideration, we find that, where, as is the case here, the title V permitting authority has the ability to include all applicable requirements in a title V permit and to enforce

all requirements of a permit, the authority to implement CAA sections 111 and 112 as well as the Acid Rain Program directly (i.e., independently of title V) is not a necessary element of an approvable title V program and therefore does not require severing pursuant to 40 CFR § 49.7(c). While we believe that it is convenient in a number of respects for a permitting authority to have the authority to implement and enforce the Acid Rain Program and other underlying regulations outside of the context of an approved title V program, we are not, at this juncture, concluding that such authority is a necessary element of an approvable title V program.

Thus, it is not necessary to sever these CAA requirements in the context of approving the Tribe's Title V Program.¹ Nevertheless, we note that the Tribe has submitted a letter to EPA expressing its intent to incorporate CAA section 111 and 112 requirements into the Reservation Air Code and pursue authorization from EPA to implement and enforce those CAA programs.

C. Criminal Enforcement Memorandum of Agreement

The TAR provides for a federal role in criminal enforcement of a program when the CAA or its implementing regulations mandate criminal enforcement authority and the applicant tribe is precluded from exercising such authority. 40 CFR §§ 49.7(a)(6) and 49.8. In these circumstances, the TAR allows EPA to approve a tribal application if the tribe enters into a Memorandum of Agreement (MOA) with EPA that provides for the federal government to exercise primary criminal enforcement responsibility. *Id.* These provisions of the TAR recognize that federal law places certain limitations on tribal criminal jurisdiction and sanctions. In this instance, the IGA reached between the Tribe and the State of Colorado contemplates that EPA will exercise criminal enforcement within the Reservation boundary for air pollution violations.

¹ If direct implementation authority for CAA sections 111 and 112 and the Acid Rain Program was a necessary element of an approvable title V program, EPA would find each of these authorities to be a severable element of such a program.

On this basis, on February 10, 2009, the Tribe and EPA entered into a MOA which provides a procedure by which the Tribe will supply potential investigative leads to the federal government in an appropriate and timely manner when the Tribe is precluded from asserting criminal enforcement authority.

IV. Evaluations of the Tribe's Title V Program Elements

EPA conducted a thorough review of the Tribe's Title V Program original and subsequent supplemental applications (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009; *Supplement to Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated September 28, 2010; *Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012) according to 40 CFR § 70.4(b) *Elements of the initial program submission*. Upon review of those applications, EPA concluded that the 16 elements found at 40 CFR § 70.4(b) were adequately addressed by the Tribe's Title V Program.

A. Summary of EPA's March 9, 2011 Proposed Interim Approval of the Tribe's Title V Program

The Southern Ute Indian Tribe submitted an initial and a supplemental Title V Program to EPA on January 20, 2009 and September 28, 2010 respectively. The Title V Program submittals include a legal opinion from the Tribe's legal counsel stating that the laws of the Tribe and Southern Ute Indian Tribe/State of Colorado Environmental Commission provide adequate legal authority to carry out all aspects of the Title V Program, and a description of how the Tribe intends to implement the Title V Program.

EPA comments noting deficiencies in the Tribe's initial January 20, 2009 Title V Program submittal were sent to the Tribe in a letter dated December 23, 2009. The deficiencies

were segregated into those that require corrective action prior to Title V Program approval, and those that, if addressed, would serve to strengthen the Title V Program, but were not necessary for approval.

In the September 28, 2010 supplemental Title V Program application, the Tribe addressed the deficiencies that required corrective action prior to Title V Program approval as well as those that served to strengthen the Title V Program. EPA reviewed these changes and determined that they were adequate to allow for Title V Program interim approval pursuant to 40 CFR § 70.4(a).

The EPA's March 9, 2011 proposed interim approval Federal Register notice outlined two changes to the Tribe's Program to be made in order for a final full approval to be granted.

Those two changes were:

- Modify the "emission unit" definition to include pollutants listed under 112(b) of the Act; and
- Modify the "major source" definition to include the updated definition for purposes of regulating greenhouses gases as part of the Prevention of Significant

Deterioration/Title V Greenhouse Gas Tailoring Rule (GHG Tailoring Rule). See 75 FR 106 at 31514-31608 (June 3, 2010).

Since the publishing of the March 9, 2011 proposed interim approval in the Federal Register, the Tribe has made the recommended changes above to its Program and resubmitted the Title V Program to the EPA (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012). Thus, the Title V Program meets the minimum requirements of 40 CFR § 70.4(b).

B. Analysis of the Tribe's Title V Program Submission per 40 CFR § 70.4(b)

1. Complete Title V Program Description

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(1). The Tribe

submitted a complete program description (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009, Tab 1, Program Description) which describes how the Tribe intends to carry out its responsibilities under part 70.

2. Regulations Comprising the Title V Program

The Tribe's Title V Program, with the operating permit regulations (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code, Articles I and II), meets the requirements of 40 CFR § 70.4(b)(2) including evidence of procedurally correct adoption of the Tribe's Reservation Air Code as well as public notice and comments on its adoption. The Tribe's Title V Program satisfies the requirements outlined in 40 CFR § 70.4 and all other relevant sections of part 70.

3. Legal Opinion

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(3). The Tribe's independent legal counsel, Maynes, Bradford, Shipp & Sheftel, LLP Attorneys at Law, submitted an initial and a supplemental legal opinion in both the initial and supplemental Title V Program applications (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009 and *Supplement to Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated September 28, 2010). The signatory of the legal opinion, the Tribe's legal counsel, Sam Maynes of Maynes, Bradford, Shipp & Sheftel, LLP Attorneys at Law, has full authority to independently represent the Tribe in court on all matters pertaining to the Tribe's Title V Program. The legal opinion includes a demonstration of adequate legal authority to carry out the requirements of part 70, including authority to carry out those activities listed at 40 CFR §§ 70.4(b)(3)(i) through (xiii).

EPA notes that the Tribe's program provides for appropriate review of final permit

actions, consistent with 40 CFR § 70.4(b)(3)(x), by providing that final permit actions of the Commission are reviewable in the United States Court of Appeals for the Tenth Circuit. *See* Pub. L. No. 108-336; Resolution No. 2008-01 dated January 31, 2008, Procedural Rules of the Southern Ute Indian Tribe/State of Colorado Environmental Commission, Section V. C.; *see also* 63 FR at 7261-62.

4. Relevant Title V Program Documentation

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(4). The Tribe submitted extensive application forms (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009, Tab 4, Program Forms) for review as well as comprehensive instructions for each form.

5. Compliance Tracking

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(5). The Tribe submitted multiple compliance assurance procedures and guidelines (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009, Tab 5, Compliance Tracking).

6. Application Completeness Determination

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(6). The Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) Article II, Sections 2-106(3) and 2-107(1)(a) demonstrates adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of its submittal, except for initial permit applications, for which the part 70 permitting authority may

take up to 3 years from the effective date of the Title V Program to take final action on the application, consistent with 40 CFR § 70.4(b)(11)(ii).

7. Fee Demonstration

The Tribe's Title V Program includes a fee accounting, which includes projected fee collection and programmatic costs (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 10 Revised Fee Demonstration Figure 1 page 6 and Table 2 page 7) that set fees above the presumptive minimum set forth in section 70.9.

The Tribe's Title V Program requires that part 70 sources pay \$50 per ton of fee pollutant (not including greenhouse gases (GHGs)) for the first year of permit issuance and then \$50 per ton plus any percentage increase necessary to reflect any increase in the Consumer Price Index (CPI) each year thereafter. The Tribe has adequately shown in the Fee Demonstration, that \$50 per ton is sufficient to cover the permit program costs and that any fees generated will be used exclusively for permit program costs. The \$50 per ton is a slight increase from the current annual part 71 fees, \$47.11 per ton. EPA notes that although the Tribe's Title V Program does not assess fees for GHGs, the fee structure is expected to be adequate to cover all program costs, provided that GHG sources below the threshold of 40 CFR Part 70 are not subject to the program. The Tribe will review resource needs for GHG-emitting sources in its fee structure if necessary and EPA will work with the Tribe if it requests assistance in establishing title V fees related to GHG emissions.

8. Statement of Adequate Personnel

The Tribe submitted a statement that adequate personnel and funding have been made available to develop, administer, and enforce the Title V Program (*Supplement to Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated

September 28, 2010, Tab 10, 40 CFR § 70.4(b)(8)). This demonstration, however, does not include permit issuance to GHG sources at 100 tpy. In addition, the Tribe has provided a supplemental staffing plan (January 4, 2011 email from Brenda Jarrell) that outlines a staff of six individuals. Those staff resumes can be found in Tab 11 of the *Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program*.

EPA has reviewed the Tribe's statement and staffing plan and concludes they are adequate. EPA notes that the Tribe's Title V Program does not cover sources below the threshold of 40 CFR Part 70 (i.e., only those sources that emit at least 100 tpy on a mass basis and 100,000 tpy on a Carbon Dioxide equivalent (CO₂e)² basis will be treated as a major source subject to title V permitting as a result of GHG emissions). Accordingly, applicability of the Tribe's Title V Program is consistent with GHG permitting requirements. *See*, 75 FR 82254 (December 30, 2010) (Title V GHG Narrowing Rule). We conclude that the Tribe's Title V Program meets the requirements of 40 CFR §70.4(b)(8).

9. Submission Commitment

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(9). The Tribe submitted a commitment (*Application for Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permit Program* dated January 14, 2009, Tab 9, 40 CFR § 70.4(b)(9)) to submit, at least annually to the Administrator, information regarding the Tribe's enforcement activities including, but not limited to, the number of civil, judicial and administrative enforcement actions either commenced or concluded; the penalties, fines, and sentences obtained in those actions; and the number of administrative orders issued.

10. Failure to Issue Permit in a Timely Manner

² CO₂e is a measure of the global warming potential of GHGs. Pursuant to the GHG Tailoring Rule, Table A-1 to subpart A of 40 CFR part 98—Global Warming Potentials (74 FR 56395) should be used in calculating CO₂e for purposes of determining whether a source's emissions exceed the major source threshold for title V. *See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 FR 31522.

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(10). The relevant provisions of the Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) Article II, Sections 2-106 and 2-107 are consistent with requirements outlined in 40 CFR §§ 70.5(a)(2) and 70.6(f).

11. Transition Plan

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(11). The Tribe's comprehensive Revised Transition Plan (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 9, Revised Transition Plan) outlines a plan and schedule for submittal and final action on initial permit applications for all part 70 (previously part 71) sources within the exterior boundaries of the Reservation.

Currently, EPA Region 8 has issued 44 part 71 permits on the Southern Ute Indian Reservation. Transfer of primary responsibility for permits is outlined in the Tribe's Revised Transition Plan. According to the Tribe's Code, this Title V Program "shall become effective upon the date of the approval by the Administrator of the Tribe's application for treatment as a state and part 70 program approval." (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code, Article II, Part I, 2-102).

Thus, upon signature of this Federal Register notice and the separate TAS application, the Tribe will begin the process of contacting all part 71 sources and informing them of when each source is expected to submit a part 70 permit application per the Tribe's transition plan (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 9, Revised Transition Plan).

12. Off Permit Changes

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(12). The Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) contains provisions, Article II, Sections 2-110, 2-111 and 2-116, allowing for changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the part 70 permit, provided the facility provides written notification as required in section 70.4(b)(12) consistent with 40 CFR §§ 70.4(b)(12)(i) through (iii).

13. Expeditious Permit Revisions and/or Modifications Review

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(13). The Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) Article II, Section 2-111 provides for adequate, streamlined and reasonable procedures for expedited review of permit revisions or modifications.

14. Tribe Only Revisions

The Tribe's Title V Program does not allow changes that are not addressed or that are prohibited as described in 40 CFR § 70.4(b)(14). Thus, this section does not apply to the Tribe's Title V Program.

15. Permit Changes Subject to Title I and IV of the Act

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(15). The Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) Article II, Section 2-116(2) prohibits sources from making, without a permit revision,

changes that are not addressed or that are prohibited by the part 70 permit, if such changes are subject to any requirements under title IV of the Act or are modifications under any provision of title I of the Act.

16. Permit Content and Permit Issuance, Renewal, Re-openings and Revisions

The Tribe's Title V Program meets the requirements of 40 CFR § 70.4(b)(16). The Tribe's Reservation Air Code (*Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* dated January 30, 2012, Tab 6, Reservation Air Code) Article II, Sections 2-107, 2-110 and 2-112 requires the Tribe's Title V Program to implement the requirements of 40 CFR §§ 70.6 and 70.7.

V. What action is EPA taking today?

EPA is promulgating a full approval rather than a full interim approval because the issues identified in the proposed interim approval have been addressed. Thus, the EPA is moving to a full approval in today's action.

The Title V Program issues identified in the EPA's March 9, 2011 proposed interim approval were addressed. The Tribe's updated RAC became effective on August 8, 2011. An *Application for Full Approval of the Southern Ute Indian Tribe's 40 CFR Part 70 Operating Permits Program* was submitted to the EPA on January 30, 2012 for final action. The following changes were made to the Tribe's Title V Program, effective August 8, 2011:

- (1) the "emission unit" definition in the RAC (found at RAC Section 1-103(26)) was modified to include pollutants listed under section 112(b) of the CAA (42 USC § 7412(b));
- (2) the "major source" definition in the RAC (found at RAC Section 1-103(38)) was modified to include the code of federal regulations' updated definitions of "major source" and "subject to regulation" (found at RAC Section 1-103(65)) for purposes of addressing greenhouse gases as part of EPA's Prevention of Significant Deterioration/Title V Greenhouse Gas Tailoring Rule

(GHG Tailoring Rule). *See* 75 FR 106 at 31514-31608 (June 3, 2010).

The change to the “emission unit” definition clarified and made the Tribe’s Title V Program consistent with 40 CFR Part 70. Although the Tribe has the authority to regulate pollutants listed under 112(b) of the Act through its “major source” and “regulated air pollutant” definitions, to be consistent, the “emission unit” definition should include 112(b) pollutants as well.

The change to the “major source” definition narrowed the number of sources requiring Title V review for greenhouse gases (GHGs) after July 1, 2011, by raising the major source threshold from 100 tons per year (tpy) to 100,000 tpy for GHGs. With this modification, the Tribe will be issuing Title V operating permits to sources with GHG emissions in a manner consistent with the federal regulations as set out in the GHG Tailoring Rule.

VI. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Review, and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden. The information collection requirements in the Title V Program are all mandated by 40 CFR Part 70. The Office of Management and Budget (OMB) previously approved the information collection requirements specified in 40 CFR Part 70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2060-0243. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act, or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impact of this final rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act (UMRA)

EPA's action in approving the Tribe's Title V Program does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. Thus, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct

effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The Title V Program primarily affects private industry and does not impose significant economic costs on state or local governments. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action will have tribal implications in that it will result in responsibility for issuing title V permits being transferred from EPA to the Tribe in that it will result in responsibility for issuing title V permits being transferred from EPA to the Tribe. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. EPA's action in approving the Title V Program will make the requirements of the Title V Program enforceable under federal law.

EPA consulted with tribal officials early in the process of developing this action to permit them to have meaningful and timely input into its development. Government to Government consultation occurred on November 3, 2010 between Region 8 Administrator, James B. Martin and then Chairman Matthew Box. Additionally, routine staff level conference calls and meetings have been held consistently throughout the review process.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety

Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it approves the Title V Program submitted by the Southern Ute Indian Tribe and thus does not concern health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive

policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final action approves the Title V Program submitted by the Southern Ute Indian Tribe and thus transfers responsibility for issuing title V permits from EPA to the Tribe.

K. Congressional Review Act (CRA)

The CRA, 5 U.S.C. 801, et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that, before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this final rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the final rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). The final rule will be effective upon approval by the Region 8 Administrator.

Dated: March 7, 2012.

James B. Martin
Regional Administrator
Region 8

40 CFR Part 70 is amended as follows:

PART 70 -- [AMENDED]

1. The authority citation for part 70 continues to read as follows:

AUTHORITY: 42 U.S.C. sections 7401, et seq.

2. In appendix A to part 70, in alphabetical order (after South Dakota and before Tennessee), add the entry for Southern Ute Indian Tribe to read as follows:

Appendix A to Part 70 – Approval Status of State and Local Operating Permits Programs

* * * * *

Southern Ute Indian Tribe

(a) The Southern Ute Indian Tribe submitted an operating permits program on January 20, 2009 with supplements on September 28, 2010 and January 30, 2012; full approval effective on March 2, 2012.

(b) [Reserved].

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